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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

No. 1393

D. H. OVERMYER WAREHOUSE COMPANY, INC.,
*Petitioner,*

v.

MAX L. KUNIANSKY, *Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on January 5, 1970.

### OPINION BELOW

The opinion of the Court of Appeals on the first appeal is reported at 406 F. 2d 818 (5th Cir. 1968). The opinion on second appeal is reported at 419 F. 2d

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1280, and is reproduced in the Appendix hereto, p. 1a. Neither opinion of the District Court appears to be reported. The second one, rendered on remand, is set forth in full in the Appendix, p. 4a.

## JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on January 5, 1970, and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## QUESTION PRESENTED

In a non-jury trial, may the judge base the verdict on his own undisclosed and unspecified private knowledge and experience, without regard to the record evidence?

## STATUTE

Georgia Code § 110-108: "*Juror Not to Act on Private Knowledge.*—A juror shall not act on his private knowledge respecting the facts, witnesses, or parties, unless sworn and examined as a witness in the case."

## STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked because of diversity of citizenship; the plaintiff is a citizen of Ohio, authorized to do business in Georgia, and defendants are citizens of Georgia.

Petitioner bought a warehouse in Atlanta, Georgia, from defendant for $458,000, and then brought action to recover damages for breach of contract specifica-

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tions in the construction. In its first decision the trial court found respondent builder liable in departing from the contract specifications and failure to use that care and skill required of a builder of reasonable ability. However, in computing compensation, the judge limited the damage to 12,500 square feet of the 120,000 square foot warehouse and awarded only $38,750.

On the first appeal the Court of Appeals reversed, holding:

> "All the evidence indicates that the entire building was damaged, and damages to the entire building was the appropriate consideration for the Court." (406 F.2d 818, at p. 822 (5th Cir. 1968).

On remand, the trial court, after reviewing the testimony, noted plaintiff's testimony on loss of market value was $95,000, while defendant claimed it should be $8,000.

Viewing these figures as outer limits, asserting the right of the triers of fact to rely upon their "own experience", and professing "to exercise knowledge and experience in such matters" the court fixed anew the decrease in market value at $45,000. (App. 5a)

Petitioner again appealed, and the Court of Appeals affirmed per curiam, saying (419 F. 2d 1280, 1282):

> "We find ourselves to be without a definite and firm conviction that a mistake had been made in fixing the valuation in dispute, *Chaney* v. *City of Galveston,* 368 F. 2d 774 (5th Cir. 1966)."

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## REASONS FOR GRANTING THE WRIT

### I. The decision below is expressly rested on matters outside the record, and therefore conflicts with applicable decisions of this Court

Constitutional due process requires that decision be made upon matters of record in the cause, and knowledge of private and special facts must be excluded. The rule is stated clearly in *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio.* 301 U.S. 292, 300 (1937). The regulatory body had reached a value determination for rate purposes partly on the basis of information in its files, and not made matters of record in the hearing. This Court, through Cardozo, J., said in perfectly apposite terms:

> (p. 300) "First, the fundamentals of a trial were denied to the appellant when rates previously collected were ordered to be refunded upon the strength of evidential facts not spread upon the record * * * Without warning or even the hint of warning that the case would be considered or determined upon any other basis than the evidence submitted, the Commission cut down the values for the years after the date certain upon the strength of information secretly collected and never yet disclosed. * * * (p. 302) *From the standpoint of due process*—the protection of the individual against arbitrary action—*a deeper vice is this,* that even now *we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out.*" (Italics supplied)

Clearly if such a trial be sanctioned, then appeals become meaningless, as Justice Cardozo said (p. 303), "as if a judge were to tell us, 'I looked at the statistics in the Library of Congress, and they teach me thus

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and so.' This will never do if hearings and appeals are to be more than empty forms."

Reversing the decree for want of Constitutional due process, this Court said:

(p. 306) ". . . nothing in the course of the trial gave warning (p. 307) of the purpose of the Commission, while rejecting evidence of value in respect of exchanges under bond, to wander afield and fix the composite value of the system without reference to any evidence, *upon proofs drawn from the clouds.* As there was no warning of such a course, so also there was no consent to it. We do not presume acquiescence in the loss of fundamental rights." (emphasis supplied).

Long ago this Court distinguished between matters subject to judicial notice and those not so well known. In *Brown* v. *Piper,* 91 U.S. 37, 41-42 (1875), the Court clearly outlined the importance of the distinction.

(p. 41) "Of private and special facts in trials (p. 42) in equity and at law, the court or jury, as the case may be, is bound carefully to exclude the influence of all previous knowledge."

Applying well-known principles of common knowledge, the Court then held a patent invalid, but stressed the distinction quoted above between matters subject to judicial notice and "private and special facts". In the case at bar we are asked to accept unstated "knowledge and experience" of the trial judge, not claimed to be subject to judicial notice, in lieu of record evidence.

In *Garner* v. *State of Louisiana,* 368 U.S. 157, 173 (1961), it was sought to substitute judicial notice for record evidence. This Court outlawed the proposal on constitutional due process grounds, saying:

"To extend the doctrine of judicial notice to the length pressed by the respondent would require

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> us to allow the prosecution to do through argument to this Court what it is required by due process to do at the trial, and would be 'to turn the doctrine into a pretext for dispensing with a trial'. *Ohio Bell Telephone Company* v. *Public Utilities Commission,* 301 U.S. 292. Furthermore, unless an accused is informed at the trial of the facts of which the court is taking judicial notice, not only does he not know upon what evidence he is being convicted, but, in addition, he is deprived of any opportunity to challenge the deductions drawn from such notice or to dispute the notoriety or truth of the facts allegedly relied upon. *Moreover, there is no way by which an appellate court may review the facts and law of a case and intelligently decide whether the findings of the lower court are supported by the evidence where that evidence is unknown. Such an assumption would be a denial of due process.* Ohio Bell, supra." (emphasis supplied)

It appears the decision below conflicts directly with the three decisions of this Court cited above; the *Ohio Bell Telephone Case; Brown* v. *Piper; Garner* v. *Louisiana.* It completely denies petitioner's constitutional right to due process of law.

**II. In refusing to follow controlling decisions of the Georgia Supreme Court, the decision below conflicts with Erie Railroad Co. v. Thompkins, 304 U.S. 64 (1938), and the federal statute there applied**

Georgia law is just as clear and every bit as plain in forbidding resort by a judge to matters of personal knowledge acquired outside the record. Georgia's Supreme Court forthrightly rejected a power assumed by the trial judge to visit the area where the dispute arose and base a decision upon information so acquired. *Brown* v. *Transcontinental Gas Pipe Line Corp.,* 210

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Ga. 580, 82 S.E. 2d 12, 15 (1954). The Court cited and followed *Atlantic & Birmingham Ry. Co.* v. *Mayor etc. of Cordele,* 125 Ga. 373, 54 S.E. 155 (1906), where the trial judge had likewise visited the site, observed the surroundings, and so couched his decision. The Court's language could not be more pertinent to the case at bar:

> (82 S.E. 2d at p. 15) "It thus appearing that the judge's personal inspection and observation were made an integral part of his judgment, and it not appearing that this was done with the consent of counsel or parties, the judgment will be *reversed, with direction that the case be heard upon the evidence which may be introduced* * * *." (emphasis supplied).

That was exactly the judgment of reversal in the *Brown case, supra,* which followed in 1954. The case must be heard and decided upon the evidence which may be introduced.

Obviously, in the case at bar, it cannot be known whether the trial judge went out to examine the property in question, consulted records of sales, or tax valuations, or took other steps to inform himself. It is to be noted that the trial judge, after asserting the right to draw upon his "own experience", expressly says (App. 5a):

> "the Court felt that sufficient data and *identity of damage* was present to exercise knowledge and experience."

This indicates the judge's feeling that his previous experience in such valuation cases has given him a special competence in the field. Of course, he may be reflecting the opinion of experts who have testified in

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other cases, or he may have devoted himself in earlier days to special study of the subject. In neither case is he free to discard the record evidence adduced and exercise his own private "knowledge and experience". That is the thrust of the Georgia Code § 110-108, which is couched in terms applicable to jurors but relates to judges, too, when they sit as "triers of the facts":

> Georgia Code § 110-108: *"Juror Not to Act on Private Knowledge.*—A juror shall not act on his private knowledge respecting the facts, witnesses, or parties, unless sworn and examined as a witness in the case."

The Georgia Supreme Court expounds the principles, stated above and applies the Georgia Code provision in *State Highway Department of Georgia* v. *Andrus,* 212 Ga. 737, 95 S.E. 2d 781, 783 (1956). For the first time the Court had to consider whether a valuation jury could base a verdict on a view of the premises and *its own knowledge and experience.*

The Answer was a resounding, "No".

Reversing the trial court (as had the Court of Appeals), citing numerous cases, the Supreme Court explained the function of the jury "in weighing the evidence". However, it laid down the clear rule that a verdict based partly upon the jury's view of the premises, should be set aside by the reviewing court, *unless the verdict is supported by substantial testimony delivered by sworn witnesses.* The Supreme Court said, "The jurors' verdict must be supported by evidence and cannot rest solely upon a view of the premises or their knowledge of the value of land, or the value of consequential benefits, as in this case." (95 S.E. 2d at 783).

Georgia's Supreme Court had earlier applied the same principle in *Gibson* v. *Carreker,* 91 Ga. 617, 17 S.E. 965, 966 (1893), an action for breach of contract to convey land. It was held *error* for the trial court *to instruct the jury that they might consider not only the evidence, but also their own private knowledge about land values.*

The Georgia Supreme Court said juries must decide questions of fact according to the evidence introduced before them, and *"their personal knowledge certainly cannot constitute a part of the evidence."* (17 S.E. at p. 966)

There is no authority in Georgia for triers of the facts, judge or jury,[1] to rely upon personal knowledge and experience in reaching a verdict. *Fulton County* v. *Bailey,* 107 Ga. App. 512, 130 S.E. 2d 800, 801 (1963); *Shahan* v. *American Tel. & Tel. Co.,* 72 Ga. App. 749, 35 S.E. 2d 5, 10 (1945).

Notably, not a word of the decision below is devoted to an evaluation of the evidence in the record. The court did not find the testimony inherently incredible, entitled to no weight, based on insufficient data or observation, or lacking in any other way.

As a matter of fact, Francis Scott Key, the plaintiff's expert, has outstanding professional qualifications as an appraiser for 15 years in Atlanta, with background

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[1] 6 Wigmore on Evidence, (3d ed. 1940) "§ 1805. *Judge Having Personal Knowledge Must Take the Stand:* . . . (1) It is equally clear for the case of the judge as for that of the juryman . . ., and upon the same principle, that the judge may not lawfully *contribute any testimony* for the jury's consideration unless he takes the stand as a witness; otherwise the opportunity of cross-examination is lost and the Hearsay rule is violated."

in construction, real estate, and mortgage banking (Tr. 515-516). With special studies in appraisal at Georgia State and at Michigan State, he is a member of the American Institute of Real Estate Appraisers. His services as appraiser have been utilized by the City of Atlanta, Atlanta banks, savings & loan associations, IBM, Ford Motor Company, and many other industries (Tr. 516). His testimony as an expert appraiser had been given several times in the United States Court, in State courts, and as a consultant for and against the Internal Revenue Service (Tr. 517). On the basis of long personal knowledge of this specific property, compiled sales comparisons and income capitalization, he appraised the warehouse in question.

His judgment was that the property was reduced in value by $95,000 in 1959 due to the defective construction. (Tr. 519-520). This was reinforced by the testimony of Atlanta structural engineer Ray K. Chalfant, Jr., who estimated a repair and rehabilitation cost approximating $98,000 in 1959 (1st Appeal, Overmyer Br. App. 46a, Tr. 502).

On the other hand, the testimony of Max Kuniansky, the defendant, obviously a witness terribly interested in this decision, with none of the impartiality or objectivity of Messrs. Key and Chalfant, indicated the loss in value was $8,000, or that the warehouse had a total market value, as built, of $492,000 in 1959. (Tr. 725-726) He did not relate this to sales or market conditions, but only to his estimate of the cost of repairs.

It seems clear that the law of this case is required to be that announced by the Georgia Supreme Court in the cases cited. *Erie Railroad Co.* v. *Tompkins,*

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304 U.S. 64 (1938). From that standard the decision below is a far cry removed.

* * * *

While the Court of Appeals has plainly said, in its concluding paragraph, the decision is affirmed because it is "without a definite and firm conviction that a mistake has been made . . . .," the very nature of the trial court's decision prevents all analysis and argument. **Petitioner feels positive a mistake has been made,** but the judicial technique, or lack of one, makes the job of proving it impossible.

This Court recognized that precise problem in the *Ohio Bell Case, supra,* and reversed for want of due process.

## CONCLUSION

Certiorari should issue to the Court of Appeals for the Fifth Circuit to clarify the responsibility of trial judges to decide cases upon the record evidence alone, and in diversity cases to follow decisional law of the States in which they sit.

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